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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court
No. 150643

BOBAN TEMELKOSKI,

Defendant-Appellant.

Court of Appeals No. 313670
Third Judicial Circuit No: 94-000424-FH
Hon. James R. Chylinski

PLAINTIFF-APPELLEE'S AMENDED BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

Plaintiff-Appellee partially concurs with Defendant–Appellant's statement regarding the basis of this Court's jurisdiction. Defendant–Appellant currently resides in Florida and must register as a sex offender there based on his 1994 Michigan conviction. To the extent that Defendant-Appellant challenges his obligation to register as a sex offender in Florida based on his Michigan conviction for a sex offense, Plaintiff-Appellee concurs with defendant's statement regarding the basis of this Court's jurisdiction.

Because defendant does not reside, work, or attend school in Michigan, however, he is not registered as a sex offender in Michigan. Thus, Michigan's Sex Offender Registry Act's (SORA) residency restrictions and prohibitions against loitering do not apply to defendant.[1] Plaintiff-Appellee contends that defendant lacks standing to challenge SORA's residency or loitering restrictions because he is not subject to them.[2] Thus, Defendant-Appellant has failed to demonstrate that these issues are "'justiciably ripe'" for review because he has not demonstrated that he has actually been injured by these restrictions.[3] Although Florida's sex offender registry has residency

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[1]MCL 28.723(1)(b).

[2]*Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 373 (2010); MCL 28.723(1)(a); MCL 28.733(b).

[3]*People v Bosca,* 310 Mich App 1, 56-57, quoting *People v Carp,* 496 Mich 440, 527 (2014) and citing *Thomas v Union Carbide Agricultural Prod Co,* 473 US 568, 580-581 (1985).

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and loitering restrictions, defendant is exempted from them because he was convicted of a crime in another jurisdiction with an offense date before May 26, 2010.[4]

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

(Leave grant issues 1, 2, 4, and 6; Defendant-Appellant's questions II, III, IV)

A regulatory statutory scheme deemed civil by the Legislature does not constitute punishment in the constitutional sense unless the defendant shows by the "clearest proof" that the purpose or effects of the statutory scheme are so punitive as to negate the Legislature's intent to deem it civil. Here, defendant has failed to show by the "clearest proof" that SORA is so punitive in effect that it negated the Legislature's intent to deem it civil. Did the Court of Appeals correctly hold that the effects of SORA were not so punitive as to defeat the Legislature's intent to deem SORA civil?

Plaintiff-Appellee answers: "YES."
Defendant-Appellant answers: "NO."
The Court of Appeals answered: "YES."

II.

(Leave grant issues 3 and 5; Defendant-Appellant's questions I and II)

A defendant bears the burden of showing that the Legislature had no rational basis for enacting a statute that was enacted pursuant to the State's regulatory, police power and that does not infringe on a protected liberty interest or a fundamental right. Here, defendant has failed to show that the Legislature had no rational basis for enacting SORA or that it deprived him of a protected liberty interest or infringed on a fundamental right.

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[4]FSA § 775.215(3)(c).

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Does SORA violate the due process of law as applied to defendant?

Plaintiff-Appellee answers: "NO."
Defendant-Appellant answers: "YES."
The Court of Appeals did not answer this question.

COUNTERSTATEMENT OF FACTS

In 1993, according to the Hamtramck Police Department report in this case, defendant, Boban Temelkoski, was nineteen-years-old when he drove the twelve-year-old victim home from her catering job. According to the victim, Defendant pulled into an alley and began kissing her face and neck. Defendant then straddled the victim's body, rendering her immobile, undid her blouse and bra, and began fondling and kissing her breasts and fondling her buttocks. The victim told defendant to stop and reminded him that she was only twelve -years-old but defendant continued to kiss and grope her for several more minutes.[5] Defendant then drove the victim home and warned her to remain quiet about the incident.

On November 30, 1993, defendant was charged with one count of second-degree criminal sexual conduct on a person under 13 years old (Defendant-Appellant's Appendix 5a). Following several pretrial hearings, on March 4, 1994, defendant pled guilty to one count of second-degree criminal sexual conduct involving a person under thirteen-years old and was assigned Holmes

[5]Plaintiff-Appellee takes issue with Defendant-Appellant's characterization and minimization of this offense as consensual but for the victim's age. First, there is no record evidence that this was consensual. Moreover, there is no record evidence in this matter of the factual basis of defendant's guilty plea, sentencing, or other trial court proceedings that are germane to the issues presented on appeal. As the moving party in the trial court and the Appellant in this Court, it was Defendant-Appellant's duty to provide the record on appeal, including the transcripts of the trial proceedings necessary to the resolution of his claims. *Band v Livonia Associates,* 176 Mich App 95, 103-104 (1989), citing MCR 7.210(A)(1) and MCR 7.210(B)(1)(a). This Court's review is limited to record evidence. *Nye v Gable, Nelson & Murphy,* 169 Mich App 411, 414, 416-417 (1988).

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Youthful Trainee Act (HYTA) status for a period of three years (Defendant-Appellant's Appendix 7a; Defendant-Appellant's Appendix 11a).[6] As conditions of his probation, Defendant-Appellant was ordered to, *inter alia,* (1) not violate any criminal laws; (2) not leave the state without consent of the court; (3) make truthful reports to his probation officer monthly or as directed by the probation officer; (4) pay a monthly supervision fee; (5) perform fifty hours of community service; (6) seek and maintain employment; (7) complete high school or a vocational training program; (8) participate in a substance abuse monitoring or treatment program; and (9) have no contact with complainant (Defendant-Appellant's Appendix 11a).

On April 1, 1996, an amended order of probation was entered requiring that Defendant-Appellant register as a sex offender pursuant to SORA. The amended order directed in relevant part:

> Pursuant to Public Acts 295 and 286 of 1994, you must also provide notification in person with the local law enforcement agency, Sheriff's Dept., of [sic]State Police W\N [sic]10 days of any address change. You must provide a complete copy of the Michigan Sex Offender Registration form to your field agent W\IN 10 days of any address change. (Defendant-Appellant's Appendix 12a).

It is not clear whether a hearing was held on the date the amended order of probation was entered. Apparently, defendant registered as a sex offender as required by the amended order of probation as the docket entries do not reveal any violations of probation for failing to do so. On April 16, 1997, an order of dismissal was entered, indicating that Defendant-Appellant had successfully completed his HYTA assignment (Defendant-Appellant's Appendix 13a).

On August 9, 2012, defendant moved for removal from SORA. Defendant argued that he should be permitted to discontinue registration under SORA because his registration constituted cruel or unusual punishment under the United States and Michigan Constitutions. Defendant

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[6]MCL 762.11, et seq.

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specifically argued that his continued registration constituted cruel or unusual punishment because he was not "convicted" of a sexual offense, the sexual offense was not "grave or severe," and the punishment of registration had caused defendant to suffer many hardships.

On September 20, 2012, Plaintiff-Appellee filed an answer in opposition to Defendant-Appellant's petition. On September 21, 2012, a hearing was held on defendant's petition. Following argument by the parties, the trial court granted defendant's petition:

> Here's my ruling:
>
> One, Holmes Youthful Trainee is not a conviction, and it's not subject to S.O.R.A. That's–it may be in the face of the law that you have, but that's my ruling.
>
> Second thing is, this is an ex post facto law. He was not subject to the law at the time that he was sentenced. All of a sudden, they pass a law later saying that he has to register. It's similar to them passing a law saying that anyone named Powell, who had been previously admitted to the Bar and has practiced in Michigan, can no longer practice [sic] Michigan and the State–in the State. It's similar to that type of thing.
>
> And thirdly, I'll make a ruling, so that you have a proper record for the Court of Appeals. This is a punishment. I don't care what they call it. It's obvious it's a punishment, that it affects somebody's life in the way of trying to get jobs, trying to, trying to do whatever they have to do, especially on something that was dismissed under Holmes Youthful Trainee. So, I find that it is a punishment, and that it–because of that, I'm gonna grant the motion to remove him from the Sex Registry. I hope that's a sufficient record for you (Defendant-Appellant's Appendix 27a-28a, 30a).

On December 4, 2012, Plaintiff-Appellee sought delayed leave to appeal the trial court's order granting defendant's petition to be removed from SORA. In an order dated July 8, 2013, the Michigan Court of Appeals denied the Plaintiff-Appellee's delayed application for leave to appeal for lack of merit in the grounds presented.[7] On August 22, 2013, Plaintiff-Appellee sought

[7]Defendant-Appellant's Exhibit 32a-32b.

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application for leave to appeal in this Court. In an order dated October 28, 2013, this Court remanded the matter to the Court of Appeals for consideration as on leave granted.[8]

On October 21, 2014, in a published opinion, the Court of Appeals concluded that SORA was not punishment and did not violate the constitutional prohibitions against enacting ex post facto laws or the imposition of cruel or unusual punishment. The Court of Appeals concluded that the trial court erred in concluding otherwise and vacated the trial court's order granting Defendant-Appellant's removal from SORA.[9] Defendant-Appellant sought application for leave to appeal in this Court. In an order dated December 18, 2015, this Court granted defendant's application for leave to appeal and directed the parties to address the following issues:

> (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721, *et seq.,* amount to "punishment", see *People v Earl,* 495 Mich 33 (2014); (2) whether the answer to that question is different when applied to the class of individuals who have successfully completed probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*(3) whether MCL 28.722(b) (defining HYTA status to be a "conviction" for purposes of SORA) provides the defendant constitutionally sufficient due process where the defendant is required to register pursuant to SORA as if he had been convicted of an offense, notwithstanding that upon successful completion of HYTA the court is required to "discharge the individual and dismiss the proceedings" without entering an order of conviction for the crime; MCL 762.14; US Const, Am XIV; Const 1963, art 1, § 17; (4) whether, assuming that the requirements of SORA do not amount to "punishment" as applied to the defendant, application of the civil regulatory scheme established by SORA to the defendant otherwise violates guarantees of due process; (5) whether requiring the defendant to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the instant offense and pled guilty under HYTA, US Const, art 1, §10; and (6) whether it is cruel and/or unusual punishment to require defendant to register under SORA, US Const, Am VIII; Const 1963, art 1, § 16.[10]

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[8]Defendant Appellant's Exhibit 32b.

[9]*People v Temelkoski,* 307 Mich App 241, 244 (2014).

[10]Plaintiff-Appellee's Appendix 1b.

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ARGUMENT
I.
(Leave grant issues 1, 2, 4, and 6; Defendant-Appellant's questions II, III, IV)

A regulatory statutory scheme deemed civil by the Legislature does not constitute punishment in the constitutional sense unless the defendant shows by the "clearest proof" that the purpose or effects of the statutory scheme are so punitive as to negate the Legislature's intent to deem it civil. Here, defendant has failed to show by the "clearest proof" that SORA is so punitive in effect that it negated the Legislature's intent to deem it civil. The Court of Appeals correctly held that the effects of SORA were not so punitive as to defeat the Legislature's intent to deem SORA civil.

Standard of Review

Whether a statutory scheme is civil or criminal is a question of law that this Court reviews de novo.[11] Challenges to the constitutionality of a statute and matters of statutory construction also present questions of law that this Court reviews de novo.[12] Reviewing courts presume that statutes are constitutional and "exercise the power to declare a law unconstitutional with extreme caution."[13] A reviewing court must not find a statute unconstitutional "merely because it appears 'undesirable, unfair, unjust, or inhumane'" or because the court finds the statute is "unwise or results

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[11] *Smith v Doe,* 538 US 84, 92 (2003); *People v Earl,* 495 Mich 33, 35-36 (2014); *People v Pennington,* 244 Mich App 188, 191 (2000).

[12] *Earl, supra*, at 36 (citations omitted).

[13] *People v Bosca*, 310 Mich App 1, 70-71 (2015), quoting *Phillips v Mirac, Inc,* 470 Mich 415, 422 (2004).

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in bad policy."[14] Such policy decisions belong to the Legislature and concerns about the policy decisions should be addressed by the Legislature.[15]

Discussion

A. Introduction

In response to the abduction, rape, and murder of seven-year-old Megan Kanka, by her neighbor, who was a convicted sex offender, Congress and all 50 states enacted laws that required sex offenders to register their addresses with local law enforcement agencies.[16] Concerned by the large number of repeat sex offenders and Megan's murder, Congress and the states enacted these registries to notify the public of "local sex offenders and to aid law enforcement in identifying and locating potential suspects in local sex-related crimes."[17] Thus, in 1994, pursuant to a Congressional mandate requiring all states to establish a sex offender registries, Michigan enacted SORA.[18]

Whether SORA violates the United States and Michigan Constitutions' prohibitions against ex post facto laws and the imposition of cruel or unusual punishments hinges on the threshold question of whether SORA constitutes punishment in the constitutional sense.[19] It does not. The jurisprudential framework for determining whether a statutory scheme constitutes punishment is the

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[14] *Bosca, supra,* 310 Mich App at 71, quoting *People v Boomer,* 250 Mich App 534, 538 (2002).

[15] *Id.*

[16] *Doe v Moore,* 410 F 3d 1337, 1340 (CA 11, 2005), citing *Smith, supra,* 538 US at 89-90.

[17] *Id.* at 1340, citing *Connecticut Dep't of Public Safety v Doe,* 538 US 1, 4 (2003).

[18] MCL 28.721, *et seq.*

[19] *Temelkoski, supra,* 307 Mich App at 250-251; *Doe v Kelley,* 961 F Supp 1105, 1108 (WD Mich, 1997); *People v Golba,*273 Mich App 603, 616-617 (2007).

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same for ex post facto challenges and cruel or unusual punishment challenges.[20] To determine whether SORA constitutes punishment, the Court must first determine the Michigan Legislature's intent in enacting it.[21] The stated legislative purpose and the placement of SORA in Michigan's Compiled Laws conclusively demonstrate that the Michigan Legislature intended SORA to be a civil, regulatory statutory scheme to protect public safety.[22] Thus, Defendant-Appellant must demonstrate by the "clearest proof" that the effects of SORA are so punitive as to negate the Legislature's intent to deem it civil.[23] Defendant-Appellant has failed to demonstrate by the "clearest proof" that SORA is so punitive in effect that it negated the Legislature's intent to deem it civil. Because SORA is not punishment in the constitutional sense, it necessarily does not violate the constitutional prohibitions against ex post facto laws and the imposition of cruel or unusual punishment.

B. The Intersection of SORA and HYTA

1. SORA

In 1994, pursuant to a congressional mandate requiring all the states to establish sex offender registries, Michigan enacted SORA.[24] As originally enacted, SORA was designed solely as a law

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[20] *Temelkoski, supra,* 307 Mich App at 250-251; *Doe v Kelley, supra* 961 F Supp at 1108; *Golba, supra,* 273 Mich App at 616-617.

[21] *Smith, supra*, 538 US at 92; *Earl, supra*, 495 Mich at 38.

[22] *Smith, supra*, 538 US at 92; *Earl, supra*, 495 Mich at 38.

[23] *Smith, supra*, 538 US at 92; *Earl, supra*, 495 Mich at 38.

[24] MCL 28.721, *et seq.*

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enforcement tool and the registration records were confidential and not open to public inspection.[25] Effective April 1, 1997, SORA was amended to permit limited public inspection of registration records for sex offenders located in their zip code at law enforcement agency locations during their regular business hours.[26] The information included the offender's name, aliases, birthdate, physical description, address, and listed conviction offense.[27] Effective September 1, 1999, SORA was amended to create a publicly accessible registry, via the Internet.[28] The following information is posted on SORA's publicly-accessible website and appears before the user is permitted to search the registry:

> This registry is made available through the Internet with the intent to better assist the public in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders.
>
> The Sex Offenders Registration Act, MCL 28.721, et seq., directs the Michigan State Police (MSP) to develop and maintain a public registry and provides guidelines on the type of offender information available to the public. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children of this state. The registration requirements of the Sex Offenders Registration Act are intended to provide the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. The offense link available on the offender details page reflects the current statute and due to continuous legislative changes, may not be indicative of the statute at the time the offender was convicted.

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[25] 1994 PA 295*; People v Rahilly,* 247 Mich App 108, 114 (2001), lv den 465 Mich 969 (2002).

[26] 1996 PA 494; MCL 28.730(2); MCL 28.728(2).

[27] MCL 28.728(2); MCL 28.730(2).

[28] *Rahilly, supra,* 247 Mich App at 114, citing MCL 28.728(2).

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> The information contained on the Public Sex Offender Registry (PSOR) can change quickly. The MSP frequently updates the registry in a continuous effort to provide complete and accurate information. While much of the information is obtained from public records, such information such as physical description and residence, is gathered from the offenders themselves who may fail to provide accurate information. Therefore, the MSP makes no representation, express or implied, that the information contained on the PSOR is accurate. Any individual who believes that information contained on the PSOR is not accurate should contact the local enforcement agency, sheriff's office, or the nearest state police post having jurisdiction over the offender's residence. Information provided through the PSOR is public information. However, it is your responsibility to make sure the records accessed through the registry pertain to the person about whom you are seeking information. Extreme care should be exercised in using any information obtained from this web site. Information on this site must not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. Any such action could result in civil or criminal penalties. The MSP is not responsible for any errors or omissions produced by any secondary dissemination of this information.[29]

Although providing less detail than the database accessible to law enforcement, SORA provides public access to "names, aliases, addresses, physical descriptions, birth dates, photographs, and specific offenses for all convicted sex offenders in the state of Michigan."

In 2011, SORA was amended again, in part, to bring SORA into compliance with the federal Sex Offender Registration and Notification Act (SORNA).[30]

2. HYTA

In essence, HYTA is a diversion program for youthful offenders aged 17 to 21.[31] HYTA provides that an appropriately aged youthful offender who pleads guilty to a criminal offense may

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[29] Michigan Public Sex Offender Registry, available at www.communitynotifcation.com/cap_main.php?office_55242/ (accessed August 12, 2016).

[30] *Bosca*, *supra,* 310 Mich App at 67, citing 2011 PA 17 and 42 USC 16901, *et seq.*

[31] *Doe, XIV v Michigan Dep't of State Police, et al,* 490 F 3d 491, 494 (CA 6, 2007); MCL 762.11, et seq. HYTA was recently amended to expand the age limit to 24. MCL 762.11.

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be assigned to status as a youthful trainee by the trial court.[32] Unless the trial court revokes the defendant's status as a youthful trainee, assignment to youthful trainee status does not constitute a criminal conviction.[33] If the defendant successfully completes his status as a youthful trainee, the trial court "shall discharge the individual and dismiss the proceedings."[34] Upon a defendant's successful completion of and discharge from HYTA, he "shall not suffer a civil disability or loss of right or privilege" due to his assignment as a youthful trainee.[35] Unless HYTA status is revoked and a judgment of conviction is entered, "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection."[36] A defendant who is assigned to HYTA status may be sentenced to a determinate sentence of up to three years imprisonment, up to one year in county jail, or up to three years on probation.[37]

3. Intersection between SORA and HYTA

At the same time it enacted SORA, the Michigan legislature also amended HYTA to provide that HYTA assignees were required to register as sex offenders and provided "[a]n individual assigned to youthful trainee status for a listed offense enumerated in section 2 of the sex offenders registration act is required to comply with the requirements of that act."[38] Requiring HYTA

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[32]MCL 762.11(1).

[33]*Doe, XIV, supra,* at 494; MCL 762.12.

[34]MCL 762.14(1).

[35]MCL 762.14(2).

[36]MCL 762.14(4).

[37]MCL 762.13.

[38]*Doe, XIV, supra,* at 495, quoting 1994 PA 286.

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assignees to comply with SORA was effectively an exception to HYTA's general provision that successful completion and discharge of HYTA assignment ensured that "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection."[39] As a result, SORA contains information about defendants who were assigned to HYTA status, successfully completed their assignment obligations, and were never convicted of the offenses for which they had to register.

SORA and HYTA have been amended several times. Before it was amended in 2004, SORA defined "convicted" in relevant part to mean "'[b]eing assigned to youthful trainee status pursuant to sections 11 to 15 of the code of criminal procedure, Act No 175 of the Public Acts of 1927, being sections 762.11 to 762.15 of the Michigan Complied Laws'."[40] Effective October 1, 2004, SORA amended the definition of "convicted" to include in relevant part:

> (A) Being assigned to youthful trainee status under sections 11 to 15 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11 to 762.15 *before October 1,* 2004.
>
> (B) Being assigned to youthful trainee status under sections 11 to 15 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11 to 762.15 *on or after October 1, 2004 if the individual's status of youthful trainee is revoked and an a adjudication of guilt is entered.*[41]

At the same time, HYTA was amended to render HYTA assignment unavailable to most youthful offenders who had been charged with criminal sexual conduct. Only youthful offenders charged with "so-called Romeo-and-Juliet offenses" involving consensual activity between youthful

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[39] *Doe, XIV, supra,* at 495, quoting MCL 762.14(4).

[40] *Doe, XIV, supra,* at 495-496, quoting 1994 PA 1965.

[41] *Doe, XIV, supra,* at 495-496, quoting 2004 PA 240 (emphasis in original).

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offenders and another youth aged between 13 and 16 remained eligible for HYTA assignment under the 2004 amendments.[42]

In 2011, SORA was substantially amended to comply with SORNA. SORA now categorizes sex offenders into three tiers. An offender's tier placement determines the length of his registration and the frequency of his reporting requirements. A defendant's tier classification is based solely on his offense and is not based on an individualized risk assessment. The 2011 amendments to SORA increased the duration of registration for most registrants, including Tier III offenders. Tier III offenders who reside, work, or attend school in Michigan are required to register for life and are required to report in person four times a year.

C. The Michigan Legislature intended the Michigan Legislature to be a civil, regulatory statutory scheme designed to protect public safety

As this Court most recently directed in *People v Earl*, the determination of whether a statutory scheme imposes punishment involves a two-part inquiry.[43] First, the court must determine whether the Legislature intended the challenged statute as a criminal punishment or a civil remedy. If the Legislature intended to impose a criminal punishment, retroactive application of the law "violates the Ex Post Fact Clause and the analysis is over."[44] If, however, the Legislature intended to enact a civil remedy or regulatory scheme, the court must determine whether "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil."[45]

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[42] *Doe, XIV, supra,* at 496, citing MCL 762.11, *et seq*.

[43] *Smith, supra*, 538 US at 92; *Earl, supra*, 495 Mich at 38.

[44] *Earl, supra*, 495 Mich at 38.

[45] *Earl, supra*, 495 Mich at 38, quoting *Smith, supra,* 538 at 92.

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To determine the Legislature's intent, the court must begin with the challenged statute's text and structure to determine if the Legislature "indicated either expressly or impliedly a preference for one label or the other."[46] A statute that "imposes a disability for purposes of punishment–that is, to reprimand the wrongdoer, to deter others, etc., [] has been considered penal."[47] Conversely, a statute is construed to intend "'a civil remedy if it imposes a disability to further a legitimate governmental purpose."[48] When statutes have both a penal and nonpenal effect, the controlling characterization of the statute depends on the Legislature's purpose.[49] A legislative restriction imposed pursuant to the State's power to protect the health, safety, and welfare of its citizens is construed as "evidencing an intent to exercise the regulatory power, and not a purpose to add to the punishment."[50]

In *Smith,* which involved an ex post facto challenge to Alaska's Sex Offender Registration Act (ASORA), the United States Supreme Court recognized that the manner of codification and enforcement procedures for a statutory scheme are probative of legislative intent to deem it civil or criminal.[51] The Court rejected the Alaska sex offender registrant's argument that the imposition of criminal sanctions for violating ASORA demonstrated a punitive intent by the legislature.[52]

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[46] *Earl, supra*, 495 Mich at 38, quoting *Smith, supra,* 538 US at 92.

[47] *Earl, supra*, 495 Mich at 38-39, quoting *Trop v Dulles*, 356 US 86, 96 (1958).

[48] *Id.*

[49] *Id.* at 41-42.

[50] *Earl, supra, at* 42-42, quoting *Smith, supra,* 538 US at 93-94.

[51] *Smith, supra ,* 538 US at 94.

[52] *Smith, supra,* at 96.

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Similarly, the Michigan Legislature expressly declared its intent that SORA was enacted pursuant to the exercise of its police power to protect its citizens and to aid law enforcement in preventing and protecting future sexual crimes. MCL 28.721a provides:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act ***poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.***

The Legislature codified SORA in Chapter 28 of the Michigan Code, which is designated as providing for public safety and to create and maintain the state police. Thus, the text, structure, and manner of codification all support the conclusion that SORA was intended to be a civil, regulatory statutory scheme.[53] Indeed, our Court of Appeals' decisions have repeatedly held that SORA was not punitive, but is a "regulatory scheme designed to protect the public and provide a civil remedy."[54]

Accordingly, the Court of Appeals here correctly concluded that the Legislature intended SORA to be a civil, regulative statutory scheme designed to protect the health and welfare of the public, noting that "'[t]he Legislature's intent as set forth in express terms was not to chastise, deter, or discipline an offender, but rather to assist law enforcement officers and the people of this state in

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[53] *John Does 1-4 and Mary Doe v Snyder, et al*, 932 F Supp 2d 803, 811 (2013).

[54] *Golba, supra,* 273 Mich App at 617; *Pennington, supra,* 240 Mich App at 193-197.

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preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders.'"[55]

D. Defendant-Appellant must demonstrate by the "clearest proof" that SORA is "so punitive in either purpose or effect as to negate the State's intention to deem it civil."[56]

Because the Legislature intended SORA to create a civil, regulatory scheme, this Court can only reject this "manifest intent" if defendant provides the "clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention to deem it civil."[57] This determination is made by considering the factors employed in *Kennedy v Mendoza-Martinez.*[58] In *Smith,* the United States Supreme Court applied five of the *Mendoza-Martinez* factors to ASORA to determine whether the punitive effects of ASORA negated Alaska's intent to deem it civil. The *Smith* Court considered:

> whether, in its necessary operation, [ASORA] [1] has been regarded in our history and traditions as a punishment, [2] imposes an affirmative disability or restraint, [3] promotes the traditional aims of punishment, [4] has a rational connection to a nonpunitive purpose, and [5] is excessive with respect to this purpose.[59]

In *Earl*, this Court followed the *Smith* Court's approach in evaluating an ex post facto challenge to the Michigan Crime Victims Rights Act. The test for considering whether a statute constitutes

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[55] *Temelkoski, supra,* 307 Mich App at 261, quoting *People v Dipiazza,* 286 Mich App 147, 148 (2009).

[56] *Smith, supra,* 538 US at 92.

[57] *Earl, supra,* 495 Mich at 44, quoting *Smith, supra,* 538 US at 92.

[58] 372 US 144, 168-169 (1963); *Smith, supra,* 538 US at 97; *Earl, supra,* 495 Mich at 44.

[59] *Smith, supra,* 538 US at 97.

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punishment for purposes of ex post facto and cruel or unusual challenges is the same. Each factor will be considered in turn.

1. SORA does not impose an affirmative disability or restraint

The first factor to be considered is whether SORA imposes an affirmative disability or restraint. In applying this factor, the reviewing court inquires into "how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive."[60] In *Smith,* the United States Supreme Court concluded that ASORA did not impose an affirmative disability or restraint, reasoning that ASORA was not akin to imprisonment because it did not impose physical restraints, did not limit the registrant's ability to move or change jobs, and its effects were less severe than occupational disbarment, which had previously been held to be non-punitive.[61]

The *Smith* Court rejected the defendant's argument that ASORA imposed a severe restraint because it would likely render registrants "completely unemployable."[62] The Court explained that even without ASORA, employers could discover the same information through routine background checks. The Court acknowledged: "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record."[63]

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[60] *Temelkoski*, *supra,* 307 Mich App at 264-265, quoting *Smith, supra,* 538 US at 97.

[61] *Smith, supra,* 538 US at 100.

[62] *Smith, supra,* 538 US at 101.

[63] *Id.* at 101.

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The Court further reasoned that ASORA did not impose an affirmative restraint or disability because unlike probation or supervised release, which "entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction," registrants under ASORA were "free to move where they wish and to live and work as other citizens, with no supervision."[64] The Court also emphasized that any prosecution for failing to complying with ASORA registration required a prosecution separate from the original offense.[65]

Defendant-Appellant, here, argues that SORA imposes significant hardships on him and his family including loss of employment, impairment of his ability to father his children, harassment, and depression. Defendant argues that, unlike the registrant in *Smith,* because he was assigned to HYTA status, neither the details nor the fact of his offense are publicly available through a routine background check and the information is only publicly available through SORA.

Our Court of Appeals rejected this argument, noting that "[a]lthough defendant certainly experiences adverse effects from being listed on SORA, these effects stem from the commission of the underlying act, not SORA's registration requirements."[66] The Court explained that while collateral effects may flow indirectly from SORA's registration requirements, "'punishment in the criminal justice context must be reviewed as the *deliberate imposition by the state* of some measure *intended* to chastise, deter or discipline. Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment.'"[67] The Court

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[64] *Smith, supra,* 538 US at 101-102.

[65] *Id.*

[66] *Temelkoski*, *supra,* 307 Mich App at 265-266.

[67] *Temelkoski*, *supra,* 307 Mich App at 266, citing *Pennington, supra,* 240 Mich App at 196 quoting *Doe v Kelley, supra,* 961 F Supp at 1111.

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concluded that because SORA was a "remedial measure intended to protect the health, safety, and welfare of the general public," this factor weighed in favor of finding that SORA did not impose punishment as applied to defendant.[68]

Our Court of Appeals' conclusion is bolstered by Federal case law interpreting the disclosure of otherwise confidential information through sex offender registries. Although this Court is not bound by federal case law, it can be considered persuasive, particularly when interpreting federal laws that are similar to the state laws in question.[69] In *United States v WBH,* the Eleventh Circuit Court of Appeals considered whether it violated the Ex Post Facto Clause to require a defendant who was convicted of a post-SORNA crime that is not a sex offense to register as a condition of supervised release because of a pre-SORNA, Alabama Youthful Offender Act conviction that was a sex offense.[70]

WBH was 18 years old when he was convicted of first-degree rape and sentenced to three years probation under Alabama's Youthful Offender Act for his participation in a gang rape.[71] Under this Alabama statute, the records of the proceeding were sealed, but the court had discretion to open the records for inspection and the records were also to be considered in sentencing for subsequent

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[68] *Temelkoski*, *supra,* 307 Mich App at 266.

[69] *People v Victor*, 287 Mich 506, 548 (1993).

[70] 664 F 3d 848, 851 (CA 11, 2011).

[71] *Id.* at 851, citing Ala Code § 15-19-1 *et seq*.

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crimes.[72] At the time of the defendant's conviction for rape in 1987, there were no state or federal laws that required him to register as a sex offender.[73]

Many years later, the defendant became a major drug distributor and pled guilty to conspiracy to distribute 1,000 kilograms or more of marijuana. As part of his sentence for the drug crime, the defendant was ordered to register as a sex offender under SORNA because of his 1987 rape conviction. WBH argued that SORNA imposed affirmative disabilities or restraints on individuals convicted under the Alabama Youthful Offender Act because it deprived them of the benefits of being a youthful offender. Benefits afforded to youthful offenders in Alabama included (1) prohibiting the "use of incriminating statements or confessions in determining guilt"; (2) "a maximum sentence of three years regardless of the crime"; and (3) "more lenient sentencing in general (as evidenced by the fact that WBH received three years probation for rape."[74] The Court rejected this argument after concluding that the only youthful offender benefit affected by SORNA was "any remaining confidentiality concerning the crime and conviction" and that the disclosure of that information did not make SORNA registration punitive.[75]

Likewise, In *United States v Under Seal,* the Fourth Circuit Court of Appeals held that the federal sex offender registry, Sex Offender Registration and Notification Act ("SORNA") did not violate the Eighth Amendment's prohibition against cruel and unusual punishments as applied to a juvenile defendant, whose records and identity were exempt from public examination by Federal

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[72] *Id.* at 851, citing Ala Code § 15-19-7(a), (b).

[73] *Id.* at 851.

[74] *WBH, supra,* 664 F 3d at 857-588 (citations omitted).

[75] *Id.* at 858.

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Juvenile Delinquency Act (FJDA).[76] The juvenile, who was required to register as a sex offender under SORNA as a condition of his juvenile delinquent supervision, argued that SORNA public's notification provisions contravened the confidentiality provisions of FJDA and violated the Eight Amendment's prohibition against cruel and unusual punishment. The Court found that SORNA did not impose an affirmative disability or restraint on the juvenile registrant, noting that it did not impose a physical restraint.[77] The Court likened SORNA to ASORA upheld by the United States Supreme Court in *Smith,* noting that SORNA like ASORA left SORNA registrants free to change jobs or residence without obtaining permission. The Court noted that SORNA "does not prohibit changes, it only requires that changes be reported."[78] The Court concluded that SORNA's imposition of periodic, in-person reporting and verification requirements may be inconvenient but were not punitive.[79]

In *Shaw v Patton,* the Tenth Circuit rejected the defendant's argument that the reporting and residency requirements of the Oklahoma Sex Offender Registry imposed an affirmative disability or restraint because they were significantly more onerous than the ones upheld by the United States Supreme Court in *Smith*. In *Shaw,* the Oklahoma statute prohibited sex offenders from living within 2,000 feet of a school, playground, park, or child care center. The defendant owned a house that was

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[76]709 F 3d 257, 259 (CA 4, 2013), citing 42 USC sec 16901, *et seq* and 18 USC sec 5031, *et seq*.

[77]709 F 3d 257, 259 (CA 4, 2013).

[78]*Id.* at 265, citing *WBH*, *supra,* 664 F3d at 857.

[79]*Id.*

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located within 2,000 feet of a school, playground, park, or child care center, and because the defendant could not live there, he was required to report weekly to law enforcement as a transient.[80]

While acknowledging that the defendant's weekly in-person reporting requirements were more burdensome than those upheld in *Smith*, the Court found that the additional burdens were insufficient to make his reporting requirements punitive in effect. The Court noted that other circuits had generally held that in-person reporting requirements were not punitive.[81] The Court also relied on other Supreme Court cases where the Supreme Court held that bans on working in entire industries did not constitute a punitive, affirmative disability or restraint.[82] The Tenth Circuit noted that a lifelong bar on working in an industry was harsher disability than the defendant's reporting and residency requirements.[83] Thus, our Court of Appeals correctly concluded that this factor weighed in favor of finding that SORA does not impose punishment as applied to defendant.

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[80] *Shaw v Patton,* 823 F3d 556, 568 (CA 10, May 18, 2016), citing Okla Stat tit 57, §§ 584(E), 590(A) (Supp 2009).

[81] *Id.* at 568-569, citing and quoting See *United States v Parks*, 698 F 3d 1, 6 (CA 1, 2012) (concluding that in-person reporting is inconvenient but not enough to constitute punishment); *Doe v Cuomo*, 755 F 3d 105, 112 (CA 2 2014) (holding that a requirement of quarterly in-person reporting is not punitive); *United States v Under Seal*, *supra,* 709 F 3d at 265 ("'Although [a sex offender] is required under [the Sex Offender Registration and Notification Act] to appear periodically in person to verify his information and submit to a photograph, this is not an affirmative disability or restraint.'" *Id.* (citation omitted)); *Hatton v Bonner*, 356 F 3d 955, 964 (CA 9, 2003) (stating that a California statute's requirement of in-person reporting "'is simply not enough to turn [the California statute] into an affirmative disability or restraint'"); *United States v WBH*, *supra,* 664 F 3d at 855, 857–58 (concluding that a requirement of frequent, in-person reporting is "'not enough'" to change a statutory regime from civil and regulatory to criminal and punitive). *Id.*

[82] *Id.* at 569, citing *Hudson v United States,* 522 US 93, 104 (1997)(restriction on participating in the banking industry not punitive); *DeVeau v Braisted*, 363 US 144, 160 (1960)(restriction prohibiting work as a union official not punitive); *Hawker v New York,* 170 US 189, 192-94 (1898)(revocation of medical license not punitive).

[83] *Id.* at 570, citing *Smith, supra,* 538 US at 100.

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2. SORA does not resemble historical forms of punishment

The next factor to be considered is whether SORA resembles historical forms of punishment. Our Court of Appeals distinguished SORA from historical forms of punishment, such as branding and banishment, explaining that "publicity and stigma are not integral parts of SORA."[84] Rather, the "purpose and principal effect of notification are to inform the public for its own safety, not to humiliate the offender" and "the attendant humiliation is but a collateral consequence of a valid regulation."[85] SORA is fundamentally a registration and reporting statute that provides for the dissemination of information to the public in the interest of public safety. "Dissemination of information is fundamentally different from traditional forms of punishment...and has not been viewed as punishment from a historical perspective."[86]

For instance, in *WBH,* the defendant attempted to distinguish *Smith* by arguing that because the records of his juvenile offense as an Alabama youthful offender were not made public, the dissemination and disclosure of the information contained in them through SORNA was punitive. The Eleventh Circuit rejected this argument, stating that the "only things wrong with that syllogism are its factual premise and its legal premise. As for the factual premise, an Alabama court in its discretion may permit the inspection of records relating to a youthful offender conviction...and if the same offender is later convicted of another crime, the youthful offender conviction" must be considered.[87] The Court further explained that as for "the legal premise of [the defendant's]

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[84] *Temelkoski, supra,* 307 Mich App at 263-264.

[85] *Temelkoski, supra,* 307 Mich App at 263-264, quoting *Smith, supra,* 538 US at 99.

[86] *Cutshall v Sundquist,* 193 F3d 466, 475 (CA 6, 1999).

[87] *WBH, supra,* at 856, citing Ala Code, § 15-19-7(a), (b).

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argument, the Supreme Court held in *Doe* that 'our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.'"[88] The Court explained:

> Even if the fact that a person had been convicted of a sex offense as a youthful offender were to be permanently sealed under state law, dissemination of that truthful information in a SORNA registry would be 'in furtherance of a legitimate governmental objective.'...Under *Doe* disseminating that truthful information would not be considered punishment, and it would be permitted. Any embarrassment or scorn resulting from dissemination of truthful information about [the defendant's] youthful offender conviction is a collateral consequence of a legitimate regulation."[89]

In *Under Seal*, the Court found that SORNA's registration requirements were not akin to traditional or historical punishments, noting *Smith's* holding that adult sex offender registries do not resemble traditional forms of punishment, such a public shaming or branding, which involved more than the dissemination of information. The Court rejected the juvenile registrant's attempt to distinguish *Smith* on the basis that the information about juvenile criminal offenses is generally not subject to public inspection. The Court noted that *Smith* held that "[o]ur system of does not treat the dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." [90]

Similarly, the Tenth Circuit in *Shaw* found that Oklahoma's reporting and residency requirements were not akin to the historical forms of punishment of probation and banishment. The Court found that disclosure of personal information was not tantamount to probation because historically probation (1) included supervision; (2) included multiple conditions beyond regular

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[88] *WBH, supra,* at 856, quoting *Doe, supra,* 538 US at 38.

[89] *Id.* at 856, quoting *Doe, supra,* 538 US at 1150.

[90] *Under Seal, supra,* at 265, quoting *Smith, supra,* 538 US at 98.

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reporting like obtaining employment, monthly reporting, participating in counseling, and restrictions against the use of alcohol, and (3) operated as a "deferred sentence for an underlying offense, but any violation of [the defendant's] reporting requirements would entail a criminal prosecution distinct from his underlying offense."[91]

The *Shaw* Court also found that residency requirements did not resemble banishment because historically banishment "involved the complete expulsion of an offender from a socio-political community" and "prohibited an offender from even being present in the jurisdiction."[92] The Court explained that although the residency restrictions imposed by the registry might "substantially affect" the defendant's residency options, "this impediment–regardless of its severity–does not constitute expulsion from a community."[93]

Thus, our Court of Appeals correctly held that this factor weighed in favor of a finding that SORA was not punitive.

3. Traditional Aims of Punishment

The third relevant *Mendoza-Martinez* factor involves evaluating whether SORA promotes the traditional aims of punishment, such as retribution and deterrence. The *Smith* court held that the fact that ASORA might deter future crime did not weigh in favor of finding ASORA punitive.

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[91] *Shaw*, *supra* at 564.

[92] *Shaw, supra,* at 566. Historically, banishment was akin to deportation and took the form of "expulsion, or deportation by the political authority on the ground of expediency; punishment by forced exile, either for years or for life; a punishment inflicted upon criminals, by compelling them to quit a city, place or country, for a specified period of time." *Id.* at 566, citing and quoting Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel & Unusual Punishment*, 34 Cardozo L Rev 2261, 2302 (2013)(quoting Katherine Beckett & Steven Herbert, *Banished: The New Social Control in Urban America* 10 n 28 (2009)).

[93] *Id.* at 567, citing *Doe v Miller,* 405 F3d 700, 719 (CA 8, 2005).

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The *Smith* Court reasoned that the mere fact that a government regulation may have a deterrent effect does not make the regulation punitive. The *Smith* Court explained that although the length of reporting was tied to the type of offenses committed, the registration requirements were not punitive but were "reasonably related to the danger of recidivism" and "consistent with the regulatory objective."[94]

Here, the Court of Appeals found *Smith's* reasoning persuasive. The Court of Appeals opined that although SORA might deter future sexual offenses, deterrence was not the primary purpose of the act and did not render SORA punitive. The Court noted that "while SORA exempts certain individuals from the registry requirements in situations involving a consensual act and categorizes offenders into tiers depending on the severity of the underlying offense, as in *Smith* these mechanisms are "reasonably related to the danger of recidivism" and "consistent with the regulatory objective."[95]

4. Rational Connection to a Non-Punitive Purpose

The fourth factor is whether SORA has a rational connection to a nonpunitive purpose.[96] The *Smith* Court found that ASORA advanced the state's legitimate, non-punitive purpose to protect public safety, which is advanced by alerting the public to the risk of sex offenders living in their communities. The *Smith* Court directed that this is the "most significant" factor in determining

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[94] *Temelkoski, supra,* 307 Mich App at 267, quoting *Smith, supra,* 538 US at 102-103.

[95] *Temelkoski, supra,* 307 Mich App at 267, quoting *Smith, supra,* 538 US at 102-103.

[96] *Temelkoski, supra,* 307 Mich App at 268, citing *Smith, supra,* 538 US at 102-103.

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whether a sex offender registry is punitive.[97] The *Smith* Court explained that a "close or perfect fit" between the statutory scheme and its non-punitive purpose is not required.[98]

Our Court of Appeals concluded that because SORA served the same legitimate nonpunitive purpose of protecting public safety as ASORA, this factor weighed in favor of finding that SORA does not impose punishment. Likewise, the Tenth Circuit likewise concluded in *Patton* that Oklahoma's registry's requirements were rationally related to a non-punitive fact, in that they promoted the state's interest in promoting public safety. [99] The Court also found that the residency restrictions were rationally designed to "reduce sex offenders' temptations and opportunities to re-offend."[100]

5. Excessive with Respect to a Non-Punitive Purpose

The fifth relevant factor focuses on whether the challenged act is excessive in comparison to its non-punitive purpose of protecting the safety and welfare of the public.[101] The *Smith* Court instructed that:

> The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the

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[97] *Smith, supra,* 538 US at 102-103

[98] *Id.* at 103.

[99] *Shaw, supra* at 573, citing *United States v Under Seal*, *supra* at 265.

[100] *Id.* at 574, citing and quoting *Doe v Miller*, *supra* at 716, 720 (holding that a 2,000–foot residency restriction is rationally designed to reduce recidivism by reducing temptation for sex offenders); *State v Pollard*, 908 NE 2d 1145, 1152 (Ind 2009) (stating that residency restrictions for sex offenders will "'reduce the likelihood of future crimes by depriving the offender[s] of the opportunity to commit those crimes'").

[101] *Smith, supra,* 538 US at 97.

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> problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective.[102]

In considering this factor, the *Smith* Court found that neither ASORA's reporting requirements nor the public accessibility of the information was excessive in furthering its non-punitive, legitimate purpose of protecting the public.[103] The *Smith* Court noted that ASORA required users to search for information on the website and that the website warned users that they could be prosecuted for committing crimes against registered offenders.[104] The Court found that even if required on a regular basis for the offender's lifetime, registration was a minor condition that is not excessive in relation to the non-punitive purpose of protecting public safety.[105]

Here, our Court of Appeals found *Smith's* analysis regarding this factor applicable to SORA as applied to defendant. The Court found that SORA required users to search for information on sex offenders and warned users that the use of information from SORA to "injure, harass, or commit a crime against" offenders on the registry could lead to criminal prosecution.[106] The Court also found that the length of the registry requirements were:

> reasonably tied to the legitimate regulatory purpose of protecting the public. SORA categorizes offenders into tiers, with the more serious offenses requiring lifetime registration. Furthermore, SORA contains exceptions for certain offenders who

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[102] *Smith, supra,* 538 US at 105.

[103] *Id.* at 105.

[104] *Id.* at 105.

[105] *Id.* at 104.

[106] *Temelkoski, supra,* 307 Mich App at 268-269, quoting Michigan Public Sex Offender Registry, available at www.communitynotifcation.com/cap_main.php?office_55242/ (accessed August 12, 2016).

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> engaged in consensual sexual act, limiting the effect of the registry to those individuals who the Legislature deemed posed a greater threat to the public.[107]

The Court also found that the Legislature had a rational basis for requiring certain HYTA trainees to register based on an adjudication date of October 1, 2004. The Court explained:

> Notably, when the Legislature amended HYTA to require youthful trainees assigned to that status before October 1, 2004, to comply with SORA and exempted youthful trainees assigned on or after that date, the Legislature also amended HYTA to provide that, beginning in 2004, individuals who pleaded guilty to more serious sexual offenses (including first-and second-degree criminal sexual conduct) were no longer eligible for youthful trainee status under HYTA. See 2004 PA 239, amending §§ 11 and 14 of HYTA. Therefore, the class of youthful trainees assigned under HYTA before October 1, 2004, includes individuals who pleaded guilty to more serious sexual offenses, whereas the class of youthful trainees assigned on or after October 1, 2004, did not. Thus, it was reasonable for the Legislature to require the pre-October 2004 class of HYTA youthful trainees to comply with SORA–i.e., it could have concluded that this class contained individuals who were more likely to reoffend and posed a greater threat to the public. This statutory scheme is not overly excessive, and instead "[t]he 2004 amendments continue to advance public safety goals while simultaneously 'weeding out' those youthful trainees who have been deemed less likely to reoffend.'[108]

The Court concluded that because the adverse effects that flowed from SORA as applied in this case were not "overly excessive" compared to its regulatory purpose, this factor weighed in favor of a finding that SORA did not constitute punishment as applied to defendant.

Likewise, in *WBH,* the defendant tried to distinguish *Smith's* holding concerning the excessiveness factor based on the fact that he was convicted as a youthful offender when he was 18 years old. The defendant argued that youthful offenders who committed sex offenses were less likely to re-offend than those who did so as adults and that long-term registry requirements for youthful offenders were unnecessary to protect the public. The Eleventh Circuit rejected this

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[107] *Temelkoski, supra,* 307 Mich App at 269.

[108] *Temelkoski, supra,* 307 Mich App at 270, quoting *Doe, XIV, supra,* 490 F3d at 505.

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argument, noting the defendant's argument required the Court to engage in what the United States Supreme Court had counseled against in *Smith*-- "determining whether the legislature has made the best choice possible."[109] Moreover, the Eleventh Circuit opined that "a lower rate of recidivism is not the same thing as no recidivism."[110] Even if adult sex offenders have higher recidivism rates, it does not meant that registration requirements for youthful sex offenders are excessive.[111]

The Eleventh Circuit also rejected the defendant's argument that SORNA's registration requirements were excessive as applied to youthful offenders because they resulted in "youthful offenders being ostracized for crimes that may have been the result of their undeveloped, adolescent nature."[112] The Court indicated that it was "not convinced that rape is a crime that results from an undeveloped, adolescent nature. Nor are we convinced that any collateral effects, such as the ostracism of youthful rapists, when considered in light of the intended public safety benefits, make the regulatory scheme excessive in light of its non-punitive purpose."[113] Sex offender registries serve to aid law enforcement and protect the public. As explained by the Sixth Circuit,

> Congress and several state legislatures have considered the egregiousness of sexual crimes, particularly where children are concerned, and studies have indicated that sexual offenders have high rates of recidivism. We are also mindful of the burdens the Act imposes on convicted sex offenders. However, many of these alleged burdens stem not from the Act itself, but from the potential abuse of registry information by the public. Given the gravity of the state's interest in protecting the

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[109] *WBH, supra,* 664 F3d at 860, quoting *Smith, supra,* 538 US at 104.

[110] *Id.* at 860.

[111] *Id.* at 860.

[112] *Id.* at 860.

[113] *Id.* at 860.

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> public from recidivist sex offenders, and the small burdens imposed on registrants, we cannot say that the requirements of the Act exceed its remedial purpose.[114]

In *Shaw,* the Tenth Circuit also found that Oklahoma's registry's residency and reporting requirements were not excessive in relation to its intent to promote and protect public safety.[115] The Court noted that making this determination did not require a finding that the legislature made the "best choice possible."[116] The Court noted that the United States Supreme Court generally has upheld categorical regulatory rules and has held that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."[117]

Accordingly, our Court of Appeals correctly concluded that the adverse effects that may flow from SORA are not "overly excessive" compared with its legitimate, regulatory purpose and that this factor weighed in favor of finding that SORA is not punitive as applied to Defendant-Appellant.

E. Defendant-Appellant failed to demonstrate by the "clearest proof" that effects of SORA were so punitive as to negate the Legislature's intent to deem it civil

Our Court of Appeals correctly found that SORA created a non-punitive, civil regulatory scheme. Federal circuit courts of appeal have unanimously held that retroactive application of SORNA does not violate the Ex Post Facto Clause of the United States Constitution.[118] Similarly,

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[114] *Cutshall, supra,* 193 F 3d at 476.

[115] *Shaw, supra*, at 574-575.

[116] *Shaw,supra,* at 575, quoting *Smith, supra,* 538 US at 103.

[117] *Id.* at 575, quoting *Smith, supra,* 538 US at 103.

[118] *United States v Brunner,* 762 F 3d 299, 203 (CA 2, 2013); *United States v Parks*, 698 F 3d 1, 5-6 (CA 1, 2012); *United States v Felts,* 674 F3d 599, 606 (CA 6, 2012); *United States v Elkins*, 683 F 3d 1039, 1045 (CA 9, 2012); *United States v Leach,* 639 F3d 769, 773 (CA 7, 2011); *United States v WBH, supra,* 664 F3d at 868; *United States v Shenandoah,* 595 F3d 151 (CA 3,

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federal circuit courts have upheld state sex offender registries against federal ex post facto challenges, even when those state sex offender registries contained more restrictive requirements than those in SORNA and or the Alaska registry evaluated by the United States Supreme Court in *Smith.* In accordance with the United States Supreme Court's decision in *Smith,* the weight of federal circuit court jurisprudence following *Smith,* and Michigan's jurisprudence, our Court of Appeals also correctly found that Defendant-Appellant had failed to establish by the "clearest proof" that the effects of SORA were so punitive to transform a civil, regulatory statutory scheme into punishment. Therefore, SORA and its requirements as applied to defendant do not constitute punishment.

F. SORA does not violate the prohibitions against ex post facto laws or the imposition of cruel or unusual punishment because SORA does not impose punishment.

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a statutory scheme when it "(1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence."[119] The language used in Michigan's Ex Post Facto Clause closely mirrors the federal constitution and is not interpreted more broadly than its federal counterpart.[120] The United States Constitution protects against the

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2010), cert den 560 US 974, abrogated on other grounds by *Reynolds v United States*, 565 US __ (2012); *United States v Gould*, 568 F3d 459, 466 (CA 4, 2009), cert den 559 US 974 (2010); *United States v May,* 535 F3d 912, 919-20 (CA 8, 2008), cert den 556 US 1258 (2009); *United States v Hinkley*, 550 F 3d 926, 937-38 (CA 10, 2008).

[119] *Earl, supra,* at 37, citing *Calder v Bull,* 3 US 386, 390 (1798).

[120] *Earl, supra,* at 37 n1; *In re contempt of Henry,* 282 Mich App 656, 682 (2009), citing *People v Callon,* 256 Mich App 312, 317 (2003).

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imposition of cruel and unusual punishments, where as the Michigan Constitution protects against the imposition of cruel **or** unusual punishments.[121] Because the Michigan Constitution confers broader protection than the United States Constitution, if a punishment passes constitutional muster under the Michigan Constitution, it necessarily passes muster under the United States Constitution.[122]

In order to violate the prohibitions against ex post facto law or the imposition of cruel or unusual punishments, it is axiomatic that the challenged statute must impose punishment.[123] As discussed, *supra,* SORA does not impose punishment in the constitutional sense. Therefore, SORA does not violate the prohibitions against ex post facto law or the imposition of cruel or unusual punishments.

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[121] US Const, AM VIII; Const 1963, art 1, §16.

[122] *People v Benton*, 294 Mich App 191, 204 (2011), citing *People v Nunez,* 242 Mich App 610, 619-619 n 2 (2000).

[123] *Temelkoski, supra,* 307 Mich App at 250-251; *Doe v Kelley, supra,* 961 F Supp at 1108; *Golba, supra,* 273 Mich App at 616-617.

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II.
(Leave grant issues 3 and 5; Defendant-Appellant's questions I and II)

A defendant bears the burden of showing that the Legislature had no rational basis for enacting a statute that was enacted pursuant to the State's regulatory, police-power and that does not infringe on a protected liberty interest or a fundamental right. Here, defendant has failed to show that the Legislature had no rational basis for enacting SORA or that it deprived him of a protected liberty interest or infringed on a fundamental right. SORA does not violate the due process of law as applied to defendant.

Standard of Review

Constitutional claims and statutory interpretation claims are questions of law that this Court reviews de novo.[124] Although both constitutional and statutory interpretation claims are reviewed de novo, this Court "accords deference to a deliberate act of a legislative body, and does not inquire into the wisdom of its legislation."[125] Moreover, the decision to invalidate a statutory scheme as unconstitutional "should be approached with extreme circumspection and trepidation, and should never result in the formulation of a rule of constitutional law 'broader than that demanded by the particular facts of the case rendering such a pronouncement necessary.'"[126]

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[124] *Bonner v City of Brighton,* 495 Mich 209, 220-221 (2014)(citation omitted).

[125] *Id.* at 220-221 (citation omitted).

[126] *Council of Orgs & Others for Ed. About Parochiad, Inc v Governor,* 455 Mich 557, 568 (1997), citing *United States v Raines,* 362 US 17, 21 (1960).

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Discussion

A. Introduction

Both the United States and Michigan Constitutions protect a defendant's right to receive the due process of law in nearly identical language.[127] The Due Process Clauses of the United States and Michigan Constitutions each contain components of procedural due process and substantive due process. Procedural due process implicates a defendant's right to receive notice and an opportunity to be heard before he is subject to the strictures of a law that infringe on a protected liberty or property interest. Substantive due process protects a defendant's exercise of rights that have been recognized as fundamental or implicit to a concept of well-ordered liberty from government infringement unless the government can demonstrate that it has a compelling state interest to do so and that it has narrowly tailored the means it has chosen to effect its compelling state interest.

The Michigan Legislature is empowered to enact statutes for the health, safety, and welfare of its citizens. Implicit in this power is the necessity of making policy choices and balancing competing interests. When the Legislature enacts a statute intended to protect and promote public safety, it is presumed to be constitutional. Provided the law does not infringe upon a protected liberty interest or a fundamental right, the statute must be upheld unless the challenger can show that the Legislature had no rational basis for enacting it. SORA does not infringe on a protected liberty interest or a fundamental right. Thus, Defendant-Appellant must show that the Michigan Legislature had no rational basis for enacting SORA. Defendant-Appellant has failed to show this.

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[127]US Const, AM V; US Const, AM XIV; Const 1963, art 1, § 17. The Fifth Amendment was incorporated to the states through the Fourteenth Amendment and prohibits the states from depriving any person of "life, liberty, or property, without due process of law." US Const, AM XIV.

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B. Defendant-Appellant must show that the Legislature had no rational basis for enacting SORA.

Both the United States Constitution and the Michigan Constitution guarantee defendants due process of law and provide, in relevant part, that "no person shall...be deprived of life, liberty, or property, without the due process of law."[128] Due process of law includes substantive due process of law and procedural due process of law. Substantive due process claims and procedural due process claims "implicate two separate constitutional rights" and are analyzed under "separate constitutional tests."[129] The due process clause protects against deprivations of "life, liberty, or property without due process of law."[130] Due process means more than a guarantee of fair process but also encompasses a "substantive sphere" that bars "certain government actions regardless of the fairness of the procedures used to implement them."[131]

Where the right asserted has not been recognized as fundamental, the government's interference with that right needs only to be rationally or reasonably related to a legitimate governmental interest.[132] Rational-basis review is a highly deferential standard and statutory

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[128]US Const, AM V; US Const, AM XIV; Const 1963, art 1, § 17. The Fifth Amendment was incorporated to the states through the Fourteenth Amendment and prohibits the states from depriving any person of "life, liberty, or property, without due process of law." US Const, AM XIV.

[129]*Bonner*, *supra,* 495 Mich at 213.

[130]*Bonner, supra,* at 226 quoting US Const, AM V.

[131]*Bonner, supra,* at 225, quoting *Daniels v Williams,* 474 US 327, 331 (1998).

[132]*Bonner, supra,* at 226.

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schemes are invalidated under this standard of review "only in rare or exceptional circumstances."[133] SORA's registration requirements do no implicate fundamental rights.[134]

C. Requiring Defendant-Appellant to register under SORA even though he was not "convicted" for purposes of HYTA does not violate due process.

Defendant-Appellant argues that requiring him to register as a sex offender for the duration of his life violated his due process right to "fair warning" and upset his "settled expectations."

In resolving disputed interpretations of a statute, the reviewing court must start with the plain language of the statute. When the language of the statute is clear, the legislature is presumed to have "intended the meaning plainly expressed, and the statute must be enforced as written."[135] The reviewing court should "presume that every word has some meaning, and we must avoid any construction that would render any part of the statute surplusage or nugatory."[136] It is presumed that the legislature is "aware of and legislate[d] in harmony with existing laws when enacting new laws."[137] The reviewing court "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."[138] When two statutory schemes "relate to the same subject or share a common purpose," they are considered in pari materia and must be read together. The in pari materia rule

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[133] *Doe, XIV, supra,* 490 F3d at 501.

[134] *Bosca, supra,* 310 Mich App at 77; *In re Wentworth*, 251 Mich App 560, 565-566 (2002).

[135] *Rahilly, supra,* 247 Mich App at 112.

[136] *Id.* at 112 (citations omitted).

[137] *Id.* at 112 (citations omitted).

[138] *Id.* at 112, quoting *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210 (1993).

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is intended to "give effect to the legislative purpose found in the harmonious statutes. When two statutes lend themselves to a construction that avoids conflict, that construction should control."[139]

A reviewing court may not impose its own policy choices when interpreting a statutory scheme.[140] When a statutory scheme specifically defines a term, the definition provided by the legislature governs the interpretation of the statute.[141] The legislature may define the same term differently in different statutory schemes.[142]

The legislature is presumed to have been aware of HYTA when it enacted SORA.[143] This presumption is buttressed by the fact that HYTA was amended at the same time as SORA and that each statutory scheme mentions the interaction/interplay with each other.[144] Requiring a youthful sex offender to comply with both HYTA and SORA does not lead to absurd results. The youthful sex offender assigned to HYTA, who successfully completes his assignment, has the proceeding dismissed and despite having committed and admitted to committing a crime, the youthful sex offender assigned to HYTA does not have a conviction for purposes of the Code of Criminal Procedure. Despite having to comply with SORA, the youthful sex offender still

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[139] *Rahilly, supra,* at 112-113, quoting *People v Webb,* 458 Mich 265, 274 (1998).

[140] *Houghton Lake Area Tourism & Convention Bureau v Wood,* 255 Mich App 127, 134-135 (2003), citing *Levy v Martin,* 463 Mich 478, 487 (2001).

[141] *Haynes v Neshewat,* 477 Mich 29, 35 (2007); *People v Brown,* 249 Mich App 382, 384 (2002), lv den 467 Mich 900 (2002).

[142] *Brown, supra,* 249 Mich App at 384-387n2 (discussing different statutory definitions of "firearm").

[143] *Rahilly, supra,* at 115.

[144] *Rahilly, supra,* at 115.

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> derives a benefit from [HYTA] status. For example, the individual, for purposes of providing a history in applying for employment, need not list the offense as a conviction. However, the Legislature has concluded that law enforcement agencies and the public should, nonetheless, continue to be apprised of the individual's whereabouts for purposes of tracking the offender and for the safety of the public. Thus, the individual is still provided a benefit by having [HYTA]status, but is not excused from the registration procedures of the SORA. This interpretation, in accordance with the plain, expressed language of the two statutes, does not lead to absurd results, but rather indicates that the public interest is paramount to full suppression of the information surrounding the individual's offense and his current location.[145]

Thus, at the time of defendant's guilty plea, a HYTA assignee who successfully completed his assignment received three benefits: (1) "discharge...and dismiss[al] of the proceedings"[146]; (2) HYTA assignment did not constitute a criminal conviction and the assignee "shall not suffer a disability or loss of right or privilege following his release from that status" as a result of his HYTA status;[147] and (3) "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the department of social services, and law enforcement personnel for use only in the performance of their duties."[148]

In defendant's first year of probation as a HYTA assignee in 1996, defendant's probation was amended to include registration as a sex offender (Defendant-Appellant's Appendix 12a). Probation is a matter of legislative grace, as is HYTA assignment, and the conditions of probation can be amended at any time during a defendant's probation provided defendant is given notice of the

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[145] *Rahilly, supra,* at 116 (citations omitted).

[146] MCL 762.14(1).

[147] MCL 762.14(2).

[148] MCL 762.14(3).

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conditions.[149] In 1996, when defendant learned that he would be required to register as a sex offender as a condition of his probation, including reporting in-person within ten days of any address change, he did not challenge this condition as invalidating his guilty plea nor did he move to withdraw his guilty plea. In 1997, when defendant learned that his sex offense would be subject to public inspection, he did not move to withdraw his guilty plea. In 1999, when defendant learned that he would have to publicly register as a sex offender and that the details of his crime would be accessible on the internet, he did not move to withdraw his guilty plea or for relief from judgment from his guilty plea.

Defendant argues that his due process right to settled expectations was violated by making him publicly register as a sex offender when he was promised HYTA assignment, no criminal conviction, no civil disabilities, and confidentiality of his proceedings. To prevail on his claim that SORA violates due process, defendant must show that SORA deprived him of a protected liberty or property interest.[150] Defendant bears the burden of establishing record support for his claim that the state violated the terms of the plea agreement with him. Defendant has not supplied any proof of the proceedings concerning the content of his guilty plea, his sentencing, and his amendment of probation. Because the transcripts of these proceedings were never ordered, the court reporters' notes for the hearings in this matter were destroyed after 15 years (Plaintiff-Appellee's Appendix 3b).[151]

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[149] *People v Glenn-Powers*, 296 Mich App 494, 502-503 (2012).

[150] *In re Wentworth*, 251 Mich App 560, 563 (2002).

[151] MCL 600.1428.

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The first step in determining whether a statutory scheme violates due process is whether the interest allegedly infringed by governmental action meets the definition of "life, liberty, or property." If the challenged governmental action does not infringe a life, liberty, or property interest, then the Due Process Clause affords no protection. If the Court determines that a life, liberty, or property interest is infringed upon by governmental action, the Court must determine what process is due before governmental interference is permitted.

In *Connecticut Department of Public Safety v Doe,* Doe argued that he was not a "dangerous sexual offender" and that Connecticut's public registry deprived "him of a liberty interest–his reputation combined with the alteration of his status under state law–without notice or a meaningful opportunity to be heard."[152] The United States Supreme Court held that Connecticut's public sex offender registry did not violate procedural due process when it made public all sex offenders sexual offenses without giving sex offenders an opportunity to be heard to challenge their inclusion on the public registry and without an individualized determination of dangerousness.[153]

The Court explained that registration as a sex offender on Connecticut's public registry turned on the fact of the offender's conviction alone. The Court explained that a "convicted offender has already had a procedurally safeguarded opportunity to contest" his conviction.[154] The Court reasoned that even if respondent could demonstrate that he is not a dangerous sex offender, Connecticut has made a legislative choice that the "registry information of *all* sex

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[152]538 US 1, 6 (2003).

[153]538 US at 7.

[154]*Id.* at 7.

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offenders–currently dangerous or not–must be publicly disclosed."[155] In fact, the Court opined that unless respondent could show that the substantive law was defective because it conflicted with a provision of the Constitution, "any hearing on current dangerousness is a bootless exercise."[156] A procedural due process challenge to SORA based on the argument that SORA does not provided for individualized determinations "before restricting liberty or property interests" has been foreclosed by the Supreme Court's decision in *Connecticut Department of Public Safety v Doe.*[157]

Although defendant here makes much ado about the fact under HYTA, he was not "convicted" of a listed sex offense under HYTA when he pled guilty in 1994, this argument misses the point that for purposes of SORA and HYTA, as amended at the time that SORA became effective, defendant was convicted of a listed sexual offense because SORA defines his HYTA assignment as a conviction for the purpose of SORA.[158] There is nothing constitutionally infirm about the legislature defining conviction in different, even contradictory ways to accomplish two distinct, albeit legitimate state interests–giving youthful offenders a fresh start and protecting the public from sex offenders. The legislature could constitutionally decide that protecting the public from sex offenders trumped its desire to give youthful sex offenders a completely fresh start. The legislature, as demonstrated by its amendment of HYTA at the time SORA became effective and its subsequent amendments of HYTA when it amended SORA, put its thumb on the side of protecting

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[155] *Connecticut Dep't of Public Safety v Doe, supra,* at 7.

[156] *Id.* at 7-8.

[157] 538 US at 7-8 (holding that "[s]tates are not barred by principles of procedural due process from deciding to publicly disclose the registry information of all sex offenders–currently dangerous or not"). *Id.; Doe v Mich Dep't of State Police, supra,* 490 F 3d at 502.

[158] MCL 28.722(b)(ii)(A).

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the public from sex offenders over protecting the complete anonymity of youthful sex offenders.

In *Under Seal*, like Defendant-Appellant's argument that SORA's registration requirements contravened the confidentiality guarantees of HYTA , the juvenile registrant argued that SORNA's registration requirements contravened the confidentiality guarantees of the FJDA. The purpose of the FJDA is to "'remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[159] In furtherance of this goal, the FJDA contains multiple confidentiality provisions designed to ensure that information concerning juvenile delinquency proceedings remain closed to public disclosure, including a prohibition on releasing a juvenile's name or photograph publicly in connection with a juvenile delinquency proceeding.[160]

After finding that SORNA and FJDA conflicted, the Fourth Circuit reasoned that when two statutes conflict, the more specific statute controls over the more generalized statute. The Court concluded that because SORNA was the more specific statute, it trumped any contrary provision of FJDA. The Court noted that SORNA "unambiguously directs juveniles ages fourteen and over convicted of certain aggravated sex crimes to register, and thus carves out a narrow category of juvenile delinquents who must disclose their status by registering as a sex offender."[161]

The Court relied on the legislative history surrounding SORNA as further support for its conclusion. The Court explained that Congress considered the competing interests between

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[159] *Under Seal, supra,* at 261, quoting *United States v Robinson,* 404 F3d 850, 858 (CA 4, 2005).

[160] *Id.* at 261, citing 18 USC 5038(a), 18 USC 5038(e).

[161] *Id.* at 262, citing 42 USC 16911(8).

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preserving juvenile confidentiality under the FJDA and protecting public safety under SORNA. In enacting SORNA, Congress explicitly acknowledged:

> While the Committee recognizes that States typically protect the identity of a juvenile who commits criminal acts, in the case of sexual offenses, the balance needs to change; no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes....[SORNA] strikes the balance in favor of protecting victims, rather than protecting the identity of juvenile sex offenders.[162]

The Court found that Congress was aware that it was limiting confidentiality protections under FJDA by applying SORNA to juvenile delinquents and made the policy choice to do so.[163] Regardless of whether there was disagreement with policy choices made by Congress, the Court noted its review was limited to considering the statutory text, legislative history, and timing of SORNA and that those considerations compelled the conclusion that Congress "plainly intended" SORNA's reporting and registration requirements to apply to a certain class of juvenile delinquents despite any contrary confidentiality policy considerations applicable to juvenile delinquents generally in FJDA.[164]

The Fourth Circuit's reasoning applies with equal force to this case. The timing of SORA's enactment and the concurrent amendment of HYTA and the continued amendment of HYTA each time SORA was amended demonstrate that the Michigan Legislature "plainly intended" for HYTA assignees, who committed certain sexual offenses or against certain classes of victims, including children, to be subjected to the SORA's reporting and registration requirements despite the

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[162] *Under Seal, supra,* at 262, quoting HR Rep No 109-218, pt 1, at 25 (2005)(emphasis added).

[163] *Id.* at 262.

[164] *Id.* at 262-263.

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confidentiality guarantees of HYTA. Each of its subsequent amendments of SORA and HYTA demonstrate that the Michigan Legislature was aware that by requiring HYTA assignees convicted of sex offenses to register, it was the limiting the confidentiality provisions of HYTA for sex offenders.

This conclusion is bolstered by the fact that the 2004 amendments to HYTA made most sex offenses ineligible for HYTA.[165] Defendant-Appellant would be ineligible for HYTA assignment today.[166] Like Congress's enactment of SORNA, the Michigan Legislature clearly considered the competing policy considerations between HYTA's confidentiality provisions for youthful offenders and SORA's protection of the public and struck the balance *"in favor of protecting victims, rather than protecting the identity of"* youthful sex offenders.[167] It is emphatically the legislature's right and duty to make such policy choices as the elected representatives of the citizens they represent.

Similarly, in *Does 1-4,* John Doe II argued that SORA as applied to him violated the Due Process Clause because his HYTA plea agreement included a promise of privacy.[168] The United States Supreme Court has recognized that although "[t]he Due Process Clause... protects the interests in fair notice and repose that may be compromised by retroactive legislation...[and] a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application."[169] The State may satisfy the requirement of due process "'simply by

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[165]MCL 762.11(2)(e).

[166]MCL 762.11(2)(e).

[167]*Under Seal, supra,* at 263.

[168]*John Does 1-4, supra,* 932 F Supp 2d at 820.

[169]*Landgraf v USI Film Products*, 511 US 244, 266 (1994).

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showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[170] The *Does 1-4* district court found as a matter of law that retroactively applying SORA to John Doe II was justified by a legitimate legislative purpose. Relying on the Sixth Circuit's holding in *Doe v Mich Department of State Police,* the district court concluded that the State could rationally conclude that the stated purpose for creating and maintaining SORA–to protect public safety–required the provisions of SORA "to apply retroactively to individuals who earlier pled guilty to the offenses enumerated in the Act or who were sentenced under the HYTA."[171]

D. SORA does not infringe upon fundamental rights

The Due Process Clause's substantive component "protects 'fundamental rights' that are so 'implicit in the concept of ordered liberty' that 'neither liberty or justice would exist if they were sacrificed.'"[172] Fundamental rights include those guaranteed by the Bill of Rights "as well as certain 'liberty' and privacy interests implicit in the due process clause and the penumbra of constitutional rights."[173] The United States Supreme Courts has recognized the following rights to be fundamental: "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion."[174]

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[170] *Franklin County Convention Facilities Auth v Am Premier Underwriters, Inc,* 240 F 3d 534, 550 (CA 6, 2001).

[171] *John Does 1-4, supra,* 932 at 820-821.

[172] *Doe,* XIV*, supra,* at 499, quoting *Palko v Connecticut,* 302 US 319, 325 (1937).

[173] *Doe v Moore, supra,* 410 F 3d at 1343.

[174] *Doe, XIV, supra,* at 499-500, quoting *Washington v Glucksberg,* 521 US 702, 720 (1997).

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The analysis of a substantive due process claim begins with a careful articulation of the asserted right.[175] Then, the court must determine whether the asserted right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" to the extent that it is considered "fundamental."[176] A statutory scheme that infringes upon a fundamental right is subjected to strict scrutiny and will be found unconstitutional unless it is "'narrowly tailored to serve a compelling state interest.'"[177]

In *Doe v Department of State Police,* the Sixth Circuit Court of Appeals considered substantive due process challenges to SORA brought by two groups of HYTA assignees who were required to register publicly as sex offenders despite the fact that their HYTA assignments defined their adjudications as non-convictions.[178] Members of both groups pled guilty to sex offenses, were assigned to HYTA status, and sentenced under HYTA on or before October 1, 2004.[179] One group of challengers referred to as Doe was comprised of HYTA assignees who had successfully completed their HYTA obligations and had been discharged from HYTA. The Doe challengers were required to register publicly as convicted sex offenders.[180] The second group of challengers, referred to as Poe, was comprised of HYTA assignees who had not yet completed their HYTA obligations or been

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[175]*Bonner, supra,* at 226-227 (citations omitted).

[176]*Doe, XIV, supra,* at 500, quoting *Glucksberg, supra,* 521 US at 721.

[177]*Doe, XIV, supra,* at 500, quoting *Reno v Flores,* 507 US 292, 302 (1993).

[178]The challengers also raised equal protection rights claims, which are not at issue in the instant case. *Doe, XIV, supra,* at 496-497.

[179]*Doe, XIV, supra,* at 496.

[180]*Doe, XIV, supra,* at 496.

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discharged from HYTA.[181] The Poe challengers had not been required to register as sex offenders yet but would be required to upon completion and discharge of HYTA.[182] If either group of challengers had been assigned to youthful trainee status *on or after* October 1, 2004, they would have been exempted from complying with SORA unless they failed to successfully complete their HYTA assignment.[183]

Like defendant here, the Doe challengers' records had been sealed and they argued that complying with SORA violated the state's promise that upon successful completion of HYTA, the charges against them would be dismissed and no judgment of sentence entered. In *Doe,* the challengers articulated the right asserted by them as "a general right to have information about their HYTA proceedings be excluded from public disclosure and 'to be left alone by not being falsely designated as currently dangerous sex offenders who pose a threat to public safety.'"[184]

The Sixth Circuit characterized the right asserted as that the challengers' HYTA records should be "sealed and exempted from public disclosure because, at the conclusion of their youthful trainee status, the criminal charges against them were or will be dismissed."[185] The Sixth Circuit also noted that the right asserted also included the "right to be free from being labeled a convicted sex offender when, under the HYTA, the plaintiffs were never convicted of such an offense."

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[181] *Doe, XIV, supra,* at 496-497.

[182] *Doe, XIV, supra,* at 496-497.

[183] *Doe, XIV, supra,* at 497 (emphasis in original). Of course, most youthful offenders were ineligible for HYTA assignment if they were charged with sex offenses on or after October 1, 2004. MCL 762.11(2)(e).

[184] *Doe, XIV, supra,* at 500.

[185] *Doe, XIV, supra,* at 500.

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The Sixth Circuit noted that other circuit courts of appeals that had considered substantive due process challenges to sex offender registries had rejected such challenges and found the registries constitutional.[186] The Sixth Circuit joined its sister circuits and concluded that the right asserted by the challengers was not a "fundamental right deeply rooted in our Nation's history."[187]

E. Defendant-Appellant failed to show that the Legislature did not have a rational basis for enacting SORA

SORA was enacted pursuant to the Legislature's regulatory, policing powers to protect public safety. SORA does not infringe upon any protected liberty interests or fundamental rights. Therefore, because the Legislature had a rational basis for enacting it, SORA does not violate due process.

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[186] *Doe,* XIV, supra, at 500 citing *Doe v Moore, supra,* 410 F 3d at 1345 (holding that the right to refuse to register as a sex offender is not a fundamental right); *Doe v Tandeske,* 361 F3d 594, 597 (CA 9, 2004)(per curiam)(holding that persons do not have a fundamental right to be free from registration as a sex offender); *Gunderson v Hvass*, 339 F3d 594, 597 (CA 8, 2003)(holding that sex-offender registration requirements does not infringe on plaintiff's fundamental right to be presumed innocent); *Paul P v Verniero,* 170 F3d 396, 405 (CA 3, 1999)(holding that the sex-offender registration requirements do infringe fundamental rights).

[187] *Doe, XIV, supra,* at 500. The Court, however, acknowledged that it believed that the challengers substantive due process challenge presented a close question because HYTA assignees who successfully completed their HYTA assignments did not have convictions and that requiring them to register as if though they did was inaccurate. The Court opined that although it did not rise to a substantive due process violation, the " inconsistency and the harms to the plaintiffs from their inclusion on the registry are troubling and noteworthy." *Id.*

The Sixth Circuit's concern about plaintiffs not being convicted misses the point that for purposes of SORA they are considered to have been convicted of a listed sexual offense. There is nothing constitutionally infirm about the legislature defining conviction in different, even contradictory ways to accomplish two distinct, albeit legitimate state interests.

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RELIEF

WHEREFORE, this Court should affirm the Court of Appeals decision.

Respectfully submitted,

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Dated: August 15, 2016